

No. 12,414

IN THE

United States Court of Appeals

For the Ninth Circuit

PHIL DAVIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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ARGUMENT IN RESPONSE TO BRIEF OF APPELLEE.

We submit that the appellee in its brief has made no sincere attempt to analyze the true nature of the meaning of the Commerce and Admiralty provisions of the Federal Constitution. We should first like to point out that at page 14 of its brief appellee cites the case of *London Guarantee & Accident Company, Ltd. v. Industrial Accident Commission*, 279 U.S. 109, 124, as authority for the proposition that the business of renting boats for pleasure purposes in some way constitutes that type of commerce which the makers of the constitution intended to permit the United States to regulate.

This Court should note that in the case cited the question raised was entirely different from the question present here. In the *London Guarantee* case an

employee of a pleasure boat concern met his death in the waters of Santa Monica Bay. The Supreme Court determined that in view of the locale of the accident that the Federal Compensation Provisions apply rather than those of the State of California. The long decision makes it perfectly clear that the reason for so holding lay in the fact that according to Admiralty law a uniform standard of Compensation has been set up which applies to all waters under the jurisdiction of the United States, and further that the fact that an employee is working for a company engaged in the pleasure business on such waters as a seaman does not exempt him from Federal jurisdiction. To reason that this decision has changed 150 years of decisions by our Federal Courts as to the meaning of interstate commerce is obviously fallacious. To reason that because a seaman employed by a pleasure concern on coastal waters is entitled to Federal Compensation and therefore that the waters of Lake Tahoe are Federal waters is a complete *non sequitur*.

The appellee has made much of the decision of the Supreme Court in the case of *United States v. Appalachian Power Co.*, 311 U.S. 377, 404. We concede that this decision is the most far-reaching decision by the United States Supreme Court in extending Federal control over inland waters. We believe that the present case is entirely distinct and that the present case can be clearly distinguished from the *Appalachian* case by simply using a little reasoning and common sense.

Clearly the Commerce provision of the Constitution was enacted so as to permit Congress to prevent any

burden or restraint upon substantial commercial trade between the various states. It is obviously one thing for Congress to control the erection of a dam in an interstate river which may interfere for many years in the future with possible commerce on such river and further may interfere with the newly recognized right of the Federal Government to control hydro-electric power on navigable rivers. It is certainly a totally different thing for the Federal Government to attempt to control the operation of small pleasure craft on inland waters which for many years have not been used in interstate commerce and for many years in the future will almost surely not be used for interstate commerce. No reasonable man can suggest how the regular operation of a motor boat on the water of Lake Tahoe now or in the foreseeable future could possibly interfere with that sort of useful substantial commerce between the states which actually constitutes interstate trade.

The appellee cites no case in its brief nor can we discover in all of the hundreds of Federal decisions concerning the power of the United States over navigable waters wherein it has been held that maritime regulations totally unconnected with the protection of commerce have been held to apply on inland waters not connected with the sea. If, therefore, the jurisdiction of the United States in this case must be based upon protection of interstate commerce, let the Government explain in what way the penal law that we are here concerned with is calculated to protect the non-existent commerce on Lake Tahoe. If on the other hand the jurisdiction of the Government rests upon

the Maritime and Admiralty authority granted by the Constitution, note that the defendant in this case will apparently become the first resident of these United States in recorded judicial history to be punished for a violation of maritime law on an inland water having no connection with the sea.

In conclusion, we submit that the Federal Courts have by many decisions established the following rules defining the Federal jurisdiction over United States waters:

1. The meaning of "navigable waters" so far as permitting Federal control is distinct from the meaning of the same term when determining the power of a state over waters within its boundaries. (*The Steamer Daniel Ball v. United States*, 10 Wall. 557.)

2. Whether the body of water lies wholly in one state or extends into more than one is not the determining factor as to Federal control. (*The Steamer Daniel Ball*, supra.)

3. Interior lakes used only for local traffic are not to be considered as navigable waters of the United States. (*Perry v. Haines*, 191 U.S. 17.)

4. The Commerce power and the Admiralty power are totally distinct and have no necessary connection. (*London Guarantee Co. v. I.A.C.*, 279 U.S. 109.)

5. Maritime jurisdiction is entirely dependent upon locality but commerce jurisdiction results from the necessity for protecting interstate trade in any locality. If the locality is not maritime then the state

retains power of control unless it can be shown that navigation in interstate commerce will be at least incidentally affected. (*Southern Pacific v. Jensen*, 244 U.S. 206; *Escanaba Co. v. Chicago*, 107 U.S. 691.)

6. The term "navigable waters of the United States" has reference to commerce of a substantial and permanent character and a practical construction must be put on any attempt to determine whether such commerce exists. (*Levoy v. U. S.*, 177 U.S. 622.)

7. The likelihood of future substantial commercial use is a factor to consider. (*U. S. v. Utah*, 283 U.S. 64.)

8. Past usage of the water for commercial purposes is to be considered as well as possible improvements to facilitate movement of shipping. (*U. S. v. Appalachian Power Co.*, 311 U.S. 377.)

9. The erection of a dam in a stream once used in interstate commerce and affecting hydro-electric power in several states is subject to Federal control. (*U. S. v. Appalachian*, *supra*.)

If these are indeed the rules which limit the power of the United States over inland waters, then the use of a motor boat on Lake Tahoe is most certainly not an activity calculated to permit any interference with the right of the State of California or the State of Nevada to regulate such activity.

Dated, Oakland, California,
July 17, 1950.

CLIFTON HILDEBRAND,
Attorney for Appellant.

